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JAMES R. BROWNING

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 900

McCORMICK & COMPANY, INCORPORATED,
Plaintiff-Petitioner,

against

UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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UNITED STATES,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

Petitioner, McCormick & Company, Incorporated, prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Claims entered February 11, 1959.

Opinions Below.

The opinion and findings of fact of the United States Court of Claims filed February 11, 1959, sought to be reviewed, not yet reported, holding the Petitioner not entitled to drawback is Appendix A annexed to this Petition. The opinion and findings of fact of the Commissioner recommending recovery of the drawback, filed July 14, 1958, are contained in the record.

Jurisdiction.

The judgment of the United States Court of Claims was entered February 11, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. §1255.

Questions Presented.

The questions presented are:

(1) Does the subjection of imported impure ethyl alcohol to chemical treatment and to an unusually complicated additional distillation in a domestic registered industrial alcohol plant, extracting from it excessive amounts of a poisonous substance and thereby rendering it for the first time suitable for human consumption and usable for all the purposes of Section 3250(*l*) of the Internal Revenue Code of 1939 as amended, constitute production of distilled spirits in such domestic industrial alcohol plant within the meaning of that Section so as to be eligible for drawback under that Section's terms?

(2) Does subsequent legislative acknowledgment of the discriminatory character of the statutory scheme of taxation provided by this Section 3250(*l*) render it subject to constitutional objection under the due process clause of the Fifth Amendment of the Constitution of the United States prohibiting such forms of taxation?

Statute Involved.

The pertinent provisions of the Internal Revenue Code of 1939 are contained in Section 3250(*l*) of Chapter 27 of Title 26 U. S. C. reading as follows:

"Any person using distilled spirits produced in a domestic registered distillery or industrial alcohol

> plant and fully tax-paid in the manufacture or production of medicines, medicinal preparations, food products, flavors, or flavoring extracts which are unfit for beverage purposes, upon payment of a special tax per annum, shall be eligible for drawback at the time when such distilled spirits are used in the manufacture of such products. * * * "

The drawback is allowed at a fixed rate per gallon on which the tax on the distilled spirits has been paid under Section 2800 of Chapter 26.

The Section in its entirety is reproduced in Appendix B, annexed to this Petition.

Statement.

The Court, differing with the Commissioner who recommended recovery of the drawback, held that the Petitioner was not entitled to drawback under this Section (Appendix A).

The Court found, however (Finding 6), that the impure ethyl alcohol when imported contained excessive amounts of methanol (a poisonous substance commonly called wood alcohol, Tr. 30) and other impurities, and was accordingly unsuitable for human consumption and unusable for manufacturing flavoring extracts. The Court found that this poisonous substance was subjected in a domestic registered industrial alcohol plant to processing which "consisted first of a chemical treatment in order to make the excessive impurities in the ethyl alcohol susceptible of removal through further distillation and second of an additional distillation procedure unusually complicated in nature for the removal of the excessive impurities" (Finding 7). The Court found (Finding 8) that as a result of this chemical treatment and additional distillation there were pro-

duced from the impure ethyl alcohol more than 5,000,000 U. S. wine gallons of ethyl alcohol that were suitable for human consumption and were usable in the manufacture or production of flavoring extracts.

The uncontradicted testimony shows that there emerged as a result of these processes two new commercially usable end products, ethyl alcohol fit for the non-beverage purposes of the Section and approximately 10,000 gallons of methanol which were sold commercially with Government approval for industrial purposes and not for human consumption (Tr. 29, 30, 101, 102). These uncontested facts are a true index of the plainly productive character of the processes and the magnitude of the poisonous substance and other impurities removed.

Reasons For Granting The Writ.

(a)

1. Neither the provisions of this statute nor those of the statute imposing a tax on the importation or production of distilled spirits contain any definition of "production" for the purpose of this Section. In the absence of such a statutory definition words like "produced" "are terms of ordinary speech and mean what they mean in ordinary intercourse in this context". *Western Union* v. *Lenroot*, 323 U. S. 490, 503. This case is consequently governed by the decisions of this Court in other drawback and analogous cases defining the meaning of that term.

The decision of the Court of Claims is in direct conflict with the decisions of this Court in *Saltonstall* v. *Wiebusch*, 156 U. S. 601, *Tide Water Oil Company* v. *U. S.*, 171 U. S. 210, and *Anheuser-Busch Assn.* v. *U. S.*, 207 U. S. 556. These cases state the criteria for determining the meaning of production or manufacture for tariff or drawback purposes.

They establish that where a substance has undergone a substantial change of identity, such as the change made here in order to make the product both commercially usable and fit for human consumption, the substance has been produced for such purposes.

The decision of the Court of Claims is further in conflict with the decisions of this Court in *Kidd* v. *Pearson*, 128 U. S. 1, *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, *Fruit Growers, Inc.* v. *Brogdex Co.*, 283 U. S. 1, and *East Texas Lines* v. *Frozen Food Exp. Co.*, 351 U. S. 49, establishing the principle that transformation into a different article having a different and distinct use, such as that here in which the end product is for the first time rendered fit for human consumption, constitutes production of such product.

Neither the decisions of this Court nor the dictionary definitions of the words "produce" or "manufacture" make any distinction in the meanings of the two words as applied to artificially or man made articles. "The word 'producer' does not differ essentially in its legal aspects from the word 'manufacturer' • • •"; *Allen* v. *Smith*, 173 U. S. 389, 399. The two terms are also equated whether the end product is made, by successive processes or otherwise, from raw or prepared materials. *Fruit Growers, Inc.* v. *Brogdex Co.*, *supra*, page 11, quoted below; *Tidewater Oil Co.* v. *U. S.*, *supra*, pages 218, 219; *Baltonstall* v. *Wiebusch*, *supra*, page 604.

In *Tidewater Oil Co.* v. *U. S.*, *supra*, page 27, an export drawback case, this Court held that "• • • we may say generally that an article which can only be used for a particular purpose in which the process of manufacture stops short of the completed article can only be said to be partially manufactured • • •". Here the product was intended only for use for the particular purpose of producing flavoring extracts fit for human consumption and the process of

production by which the imported impure ethyl alcohol originally came into being stopped short of the completed article.

The amount of work done or the percentage of the total amount of labor expended in the successive or further processing of the article is not decisive as to what constitutes new production or manufacture; *Saltonstall* v. *Wiebusch, supra,* page 604.

In *Kidd* v. *Pearson, supra,* page 20 and *U. S.* v. *E. C. Knight Co., supra,* page 14, this Court held that "Manufacture is transformation—the fashioning of raw materials into a change of form for use". Here the change of form for use in flavoring extracts suitable for human consumption occurred when the materials were first rendered fit for that purpose by the processes to which they were subjected in the domestic registered industrial alcohol plant.

In *Anheuser-Busch Ass'n.* v. *U. S., supra,* page 562, this Court laid down the test for manufacture or production for export drawback purposes, under a statute using the words "manufactured or produced" interchangeably, that "there must be transformation; and a new and different article must emerge having a distinctive name, character or use". Here the unusually complicated processes to which the imported impure ethyl alcohol were subjected and the poisonous substance, methanol, extracted constituted a transformation into a new and different article having a distinct character or use, namely, one fit for human consumption.

In *Fruit Growers, Inc.* v. *Brogdex Co., supra,* this Court held, page 11, that " 'Manufacture', as well defined by the Century Dictionary, is 'the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties or combinations, whether by hand-labor or by machinery' ". The Court held

that the product there involved did not constitute new manufacture because the product remained "fit only for the same beneficial uses as before" (p. 12).

Here the product did not remain fit only for the same beneficial uses as before but, on the contrary, underwent a transformation as the result of an elaborate process rendering it viable for a new and distinct use for which it was previously unfit. In fact the uncontested testimony is that the imported material had no commercial use except as feed stock for the production of ethyl alcohol (Tr. 70, 71, 102). In other words the imported ethyl alcohol had in its then form no immediate consumers' use at all.

"Production", said this Court in a decision under the Fair Labor Standards Act, includes "changing the form or utility of a tangible article", *Borden Co.* v. *Borella*, 325 U. S. 679, 683, a criterion which was assuredly fulfilled in this case.

The transformation undergone by the imported impure ethyl alcohol here constituted manufacture under the "substantial identity" test laid down by this Court in *East Texas Lines* v. *Frozen Food Exp. Co., supra*, pages [illegible] 4. This Court held that the mere incidental dressing and freezing of a chicken was not manufacture within that test. There, however, unlike the situation here, the process was not essential to make the product fit for human consumption. Where, as here, a poisonous substance unfit for any commercial use except as feed stock for the production of ethyl alcohol is transformed into a substance designed and fit for human consumption, it is inherently impossible to hold that the substance has not undergone a substantial change of identity. Indeed, the Court of Claims' finding 8 itself expressly characterizes the processes to which the imported impure ethyl alcohol were subjected in the domestic registered industrial alcohol plant as constituting production.

The Court's decision below is in direct conflict with a well considered State Court decision in *American Distilling Co.* v. *State Board of Equalization*, 144 Calif. App. 2d 457, 301 P. 2d 495 (1st Dist. 1956) 460-1 (CA 1956), embodying in effect the principles laid down by this Court in the cases above cited. There, plaintiff redistilled in California impure alcohol imported from Illinois; and sold the product of the redistillation to retail liquor dealers in California. The state statute provided that only distilled spirits "originally distilled in this State" might be sold. Thus, the issue was whether the spirits sold by plaintiff were "produced" in California, with "production" meaning original distillation. As in the instant case, the spirits to which the statute referred were spirits fit for human consumption. The court held that since the alcohol as imported was unfit for human consumption, the product of the redistillation was "originally distilled" in California, i.e., domestically "produced":

> "The (imported) alcohol as received is clearly not an alcoholic beverage (under the California statute), • • • for it is not fit for drinking purposes as it is, or when diluted, mixed or combined with other substances. It has to be subjected to the distillation process before it is transformed into a consumable product. • • •
>
> "Since a 'distilled spirit' apparently must be a beverage under the act, or a substance that can be used as such when diluted, combined or mixed with other substances, it would seem that the liquors manufactured from the impure alcohol in the respondent's distillery, are 'distilled spirits' originally distilled in this state. The original distillation which creates the beverage occurs here. • • •
>
> "• • • the (imported) alcohol was transformed into a beverage at respondent's (California) plant, and only then became 'distilled spirits' under the statute." 301 P. 2d at 498.

The record showed that the federal government had likewise held the spirits sold by plaintiff to have been "originally produced" by plaintiff in California, and required plaintiff's labels to state that the spirits were distilled, manufactured and produced in California. The trial court had said:

> "• • • the mere fact that materials had to be used in that (California) distillation which had been previously distilled by others did not in any way change the fact that the distilled spirits which would be available for sale for consumption, which were produced by distillation in this state, were the result of an original distillation in this state."

(b)

The Court of Claims reached its decision not alone by violating and failing to apply the principle of these applicable decisions of this Court but by a still further error of statutory construction of serious general consequence. The Court erroneously applied a provision of another statute, Chapter 26, Title 26 U. S. C., Internal Revenue Code of 1939, which contains no definition of "production" but which specifies the time at which alcohol and distilled spirits are deemed to be in existence solely for the purpose of the attachment of liquor taxes on importation and production of such substances, as a definition of the meaning of production of distilled spirits for the purpose of the levying of the Special Occupational Taxes imposed by this Section 3250(*l*) of Chapter 27.

The Court's error is demonstrated by the following considerations:

Chapter 26 is entitled Liquor. Parts I and II of subchapter A—Distilled Spirits—impose taxes respectively on the importation into or the production and rectification in the United States of alcohol and distilled spirits. Part

III provides for regulating, controlling and supervising internal revenue bonded warehouses and Part IV contains miscellaneous provisions relating to distilled spirits. Subchapter B—Wines—imposes a tax on wines imported into or produced in the United States, Subchapter C—Industrial Alcohol—Part I, relates to denaturization, Part II, to industrial alcohol plants. Subchapter D—Fermented Liquors—imposes a tax on fermented liquors imported into or manufactured in the United States. These taxes, therefore, and the provision for the time of their attachment, are designed to tax, the moment they are in existence, alcohol and distilled spirits in every shape, form, condition and stage of production, whether for beverage or non-beverage or for industrial purposes, and whether or not they are consumable by human beings or commercially usable or not.

The statute says nothing about how the spirits are to come into existence nor about their production. It merely states that the tax attaches when "this substance is in existence as such."

Chapter 27—Occupational Taxes—on the other hand, imposes special taxes on the manufacture and use for various purposes of a large variety of products, the great majority of which are intended for human consumption. Part I—since repealed—Oleomargarine, Part II—Adulterated and Processed or Renovated Butter, Part III a special occupational tax on Filled Cheese; Part IV, since repealed, Mixed Flour, Part V on the importation, production or manufacture of Narcotics; Part VI a similar tax on Marihuana.

Part VII consisting of Sections 3250-3255 in which the provisions in question here, i.e., Section 3250, are found, enacted subsequent to the tax attachment provision of Chapter 26, imposes special occupational taxes on wholesale and retail dealers in liquors, brewers, rectifiers, wine makers,

manufacturers of stills. Finally, subsection 1 of Section 3250, enacts a special occupational tax on "Manufacturers or producers of designated non-beverage products". The same subsection (*l*) which imposes a graduated special occupational tax on such manufacturers and producers allows a drawback at specified rates against the liquor tax imposed by Section 2800 of Chapter 26. Section 3254 of Part VII, which Part contains the Section in question, contains a special set of definitions of its own, incorporating by reference only the definition of distiller contained in Section 2809(a) of Chapter 26. No other definition in that chapter is incorporated by reference. In contrast with Parts V, VI and VIII of Chapter 27, which expressly provide (Sections 3227, 3237, 3264) for the application to such special taxes of the provisions of all laws relating to internal revenue taxes, no such provision is made in Part VII containing the Section in question with respect to the special occupational taxes thereby imposed.

Neither the provisions imposing the taxes on distilled spirits in Chapter 26 nor those imposing the occupational taxes in Part VII Section 3250 of Chapter 27 contain any definition of what constitutes production of distilled spirits. But the substances taxed by Chapter 26 are usable for a great variety of purposes, industrial and otherwise, other than for human consumption, while those whose use is taxed by the special occupational taxes imposed by Section 3250 of Chapter 27 are usable exclusively for human consumption.

The purpose of Chapter 26 is as aforesaid, to impose a catchall tax on alcohol or distilled spirits in every condition or stage, attaching to them the moment those substances are in existence as such whether humanly consumable or whether commercially usable or not. The purpose of Chapter 27 is to impose a special occupational tax on the use exclusively for non-beverage purposes of distilled

spirits for human consumption only. Its obvious intent is to encourage the domestic manufacture of the non-beverage products specified in the Section. The origin of the raw materials is unimportant provided that the distilled spirits used for those purposes are domestically produced within the accepted meaning of that word as defined by ordinary usage, dictionary definition and court decisions. Because the material was taxable in its original form does not preclude the clearly productive processes resulting here in two new commercially usable end products from constituting production of a product specially prepared to qualify for the very special purposes of Section 3250. It simply forms the basis for the allowance of the tax drawback which the Section grants.

What shall constitute production of distilled spirits for the taxing purposes of the one statute is therefore totally inapposite to what shall constitute such production for the other. The statutes are therefor not in *pari materia* within the rules of statutory interpretation established by this Court, and the separate and differing provisions of the one are not of controlling significance in interpreting the other. *Walling* v. *Portland Terminal Co.*, 330 U. S. 148, 150. The statutory definition there was held restricted to the statute defining the term, same case pp. 150, 151.

Resort in any event to other statutes can be had only where the statute—unlike the statute here—is ambiguous on its face, and "prior acts may be resorted to, to solve, but not to create an ambiguity"; *Hamilton* v. *Rathbone*, 175 U. S. 414, 421. As this Court said there, in terms applicable to the Court of Claims' resort to the prior statute, Chapter 26, to construe the later statute, Chapter 27, "It is only by calling in the aid of a prior act that it becomes possible to throw a doubt upon its (the later statute's) proper interpretation" (421).

The meaning or definition of the production of distilled spirits for the purpose of Section 3250(*l*) of Chapter 27 necessarily takes its content and color from the statutory setting in which it is found and the special humanly consumable uses to which the Section is directed. By logical necessity the end use of any material thing must first be known and considered before it can be determined whether that thing has for that purpose been produced. Standing alone the words "production" or "production for use" are empty symbols, acquiring meaning only as specific intended uses are revealed. To hold that within the meaning of the statute under consideration here distilled spirits have not been produced by an operation which renders a poisonous and unmerchantable substance humanly consumable as distilled spirits for the purposes intended by the Section is to deprive words of their meaning. It is an arbitrary construction of the statute which is contrary to law, logic and common sense. Statutory definitions, even where they exist, cannot be construed so as to distort the meaning of language, *Lawson* v. *Suwannee S. S. Co.*, 336 U. S. 198, 201, or to change the nature of acts to which the words are applied. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 289.

Petitioner, having made a large investment on the faith of a reasonable and proper interpretation of the statute in accordance with its true meaning and with the principles laid down in this Court's decisions, has by the judgment below been deprived of a substantial statutory right.

2. The decision of the Court of Claims ignores the fact that subsequent legislative acknowledgment of the discriminatory character of the statutory scheme of taxation contained in Section 3250(*l*) of the Internal Revenue Code of 1939 renders it unconstitutional under the Fifth Amendment

prohibiting such forms of taxation on the basis of this Court's decisions in *Nichols* v. *Coolidge*, 274 U. S. 531, 542, and *Heiner* v. *Donnan*, 285 U. S. 312, 326. In the latter case this Court held that the fact "that a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the Fifth Amendment is settled" (p. 326).

Taxwise Section 2800 of Chapter 26 treats, and the statute has for a long period of time treated, imported and domestically produced distilled spirits on a basis of complete equality as regards the rate of tax.

In the Excise Tax Technical Changes Act of 1958, P. L. 85-859, Section 5131 of the Internal Revenue Code of 1954 (formerly section 3250(*l*), Internal Revenue Code of 1939) was amended, effective July 1, 1959, to make eligible for drawback "distilled spirits withdrawn from the bonded premises of a distilled spirits plant" in addition to "distilled spirits produced in a domestic registered distillery or industrial alcohol plant." The effect of this amendment was discussed by the Committee on Ways and Means of the House of Representatives and by the Committee on Finance of the Senate in the following language (H. Rep. No. 481, 85th Cong., 1st Sess., p. 126; S. Rep. No. 2029, 85th Cong., 2d Sess., pp. 1313-132):

> Subsection (a), 'Eligibility for drawback': This subsection is existing law (Sec. 5131 (a)) with one substantial change. Under existing law, distilled spirits to be eligible for drawback must be produced in domestic registered distilleries or industrial alcohol plants. This provision has precluded the allowance of drawback on imported distilled spirits which have been withdrawn from customs custody without payment of tax and transferred to industrial alcohol bonded warehouses. Section 5232 authorizes

> the withdrawal from customs custody of distilled spirits of 185 or more of proof without payment of tax for spirits of 185 transfer to the bonded premises of a distilled spirits plant. This subsection eliminates the existing discrimination against the use of such imported distilled spirits subject to drawback in the manufacture of nonbeverage products, by providing for the use of any distilled spirits withdrawn from the bonded premises of a distilled spirits plant.

There is no room here for application of the rule that courts will not condemn a tax as arbitrary and discriminatory if there is any conceivable legitimate purpose justifying the legislative program (*Dominion Hotel v. Arizona*, 249 U. S. 265), because here the legislature has itself condemned its own statutory scheme of taxation as discriminatory and by consequence unjust.

3. The questions involve principles the settlement of which are of general importance to the public as distinguished from the parties. Granting the writ would further be consonant with the usual practice of this Court in the past to grant certiorari to review determinations of the Court of Claims in drawback cases. Review by this Court is the more necessary in the case of the Court of Claims since otherwise that Court becomes a court of last resort not otherwise subject to review.

In addition to the conflict of the decision below with the decisions of this Court and the constitutional issue here involved, the erroneous holding of the Court of Claims, unless reviewed and reversed, constitutes a precedent introducing confusion of far reaching consequence both in the rules of law applicable to the meaning of production in drawback and analogous cases, where uniformity of decision is

imperative, and in the rules governing statutory construction in general. The decision has implications concerning the nature of a fundamental economic concept, i.e., production and its progressive stages, of wide importance and application in many types of social as well as tax legislation.

The decision further places an interpretation on provisions of Chapter 26, a permanent piece of legislation, which will tend to becloud its future administration.

The holding in the Court of Claims' opinion that Congress did not intend courts to make determinations of the kind there specified in order to adjudicate the meaning of production introduces further confusion in the rules of statutory construction. The confusion stems from the fact that both that Court itself, other courts, and this Court have undertaken to make and have made just such determinations involving matters of degree in successive stages of production or manufacture in all the above decisions and in innumerable other cases arising under the tariff, tax, regulatory, or drawback provisions of a great variety of statutes. Questions of degree are irreducible ingredients of law itself.

These general considerations are neither academic nor episodic within the meaning of this Court's decision in *Rice v. Sioux City Memorial Park Cemetery*, 349 U. S. 70. Nor is the present case merely a special case. The amendment of the statute is prospective only and will not become effective until July 1, 1959. The question may therefore still arise in other cases not yet pending, including both those which may arise hereafter and others already arisen and not barred by statute of limitations. The amount involved in the present case, taken in conjunction with other cases involving the same issue already pending in the Court of Claims, is large, aggregating well over a quarter of a

million dollars, a circumstance which this Court noted as one factor in allowing the writ in *United States* v. *Constantine*, 296 U. S. 287 where this Court reviewed the effect of a statute which fell with the repeal of the Eighteenth Amendment.

Conclusion.

For the foregoing reasons, it is submitted that the Petition for a Writ of Certiorari should be granted.

Dated May 6, 1959

Respectfully submitted,

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Appendix A

IN THE

UNITED STATES COURT OF CLAIMS

No. 396-55

(Decided February 11, 1959)

McCORMICK & COMPANY, INCORPORATED *v.* THE UNITED STATES

MR. THORNTON C. LAND for the plaintiff. MR. PAUL L. PEYTON and MR. J. CHRISTOPHER MEYER, JR. were on the brief.

MR. BENJAMIN H. PESTER, with whom was Mr. Assistant Attorney General CHARLES K. RICE, for the defendant. MR. DAVID A. WILSON and MR. LYLE M. TURNER were on the briefs.

OPINION

LARAMORE, Judge, delivered the opinion of the court:

The question involved in this case is whether the plaintiff was entitled under section 3250 (*l*) of the Internal Revenue Code of 1939, as amended (26 U. S. C., 1952 ed., 3250 (*l*), to a drawback of the tax previously paid on a certain batch of ethyl alcohol, comprising 6,073.20 proof gallons, which the plaintiff used during August and September of 1953 in the manufacture of flavoring extracts.

During the period here involved, section 3250 (*l*) of the Internal Revenue Code of 1939, as amended, provided in part as follows:

> Any person using distilled spirits *produced in a domestic registered distillery or industrial alcohol plant* and fully tax-paid in the manufacture or pro-

> duction of medicines, medicinal preparations, food products, flavors, or flavoring extracts which are unfit for beverage purposes, upon payment of a special tax per annum, shall be eligible for drawback at the time when such distilled spirits are used in the manufacture of such products * * *. [Emphasis supplied.][1]

It is common knowledge that ethyl alcohol (i.e., ordinary alcohol) comes within the category of distilled spirits. Moreover, it is clear from the evidence in this case that the particular batch of ethyl alcohol involved in the litigation was fully tax-paid at the time when it was used by the plaintiff, that the plaintiff used it in the manufacture of flavoring extracts, that such flavoring extracts were unfit for beverage purposes, and that the plaintiff had paid the special annual tax mentioned in section 3250 (*l*) of the Internal Revenue Code of 1939, as amended. Therefore, the principal issue in the case is whether the ethyl alcohol was "produced in a domestic registered distillery or industrial alcohol plant."

The particular batch of ethyl alcohol with which we are concerned was purchased by the plaintiff on August 7, 1953 from the U. S. Industrial Chemicals Company (which will usually be referred to in this opinion as "USI"). USI was then, and is now, the operator under 26 CFR, Part 182, of a domestic registered industrial alcohol plant at Curtis Bay, Baltimore, Maryland.

Acting in accordance with the authorization contained in section 3125 (a) of the Internal Revenue Code of 1939, as amended (26 U. S. C., 1952 ed., 3125 (a)), for the importation into the United States of "alcohol of 160 proof, or greater," for industrial purposes, USI on June 2, 1953 entered into a contract with the Justfrank Company for the purchase by the former from the latter of:

> * * * approximately 5,675,000 U. S. wine gallons of ethyl alcohol, at 190 U. S. proof, * * * stored in * * * France.

---

[1] A similar provision is found in Sec. 5131 (a) of the Internal Revenue Code of 1954. (26 U. S. C., 1952 ed., Supp. V, 5131 (a).)

It was provided in the contract that the ethyl alcohol should be delivered to USI at its Curtis Bay plant. The contract prescribed various specifications, in addition to the matter of proof, which the ethyl alcohol should meet.

During June and July of 1953, the Justfrank Company shipped or caused to be shipped to USI from France a total of 5,583,529 U. S. wine gallons of impure ethyl alcohol. This ethyl alcohol failed to meet a number of the specifications prescribed in the contract. It did, however, meet the requirement of the contract as to proof.

Although the impure ethyl alcohol that was furnished to USI under the contract of June 2, 1953 failed to meet a number of the specifications prescribed in the contract, the ethyl alcohol was accepted by USI when it was tendered for delivery at USI's Curtis Bay plant. Because of the presence in this ethyl alcohol of impurities, particularly excessive amounts of methyl alcohol (methanol), amyl alcohol, and nonvolatile residue, the ethyl alcohol, at the time when it was delivered to and received by USI, was not suitable for human consumption and was not usable in the manufacture or production of medicines, medicinal preparations, food products, flavors, or flavoring extracts (i.e., the purposes mentioned in section 3250 (*l*) of the Internal Revenue Code of 1939, as amended).

Shortly after the importation by USI of the impure ethyl alcohol from France, the alcohol was processed by USI in its plant at Curtis Bay. The processing consisted, first, of a chemical treatment in order to make the excessive impurities in the alcohol susceptible of removal through further distillation, and, second, of an additional distillation procedure, unusually complicated in nature, for the removal of the excessive impurities. There resulted from this chemical treatment and additional distillation a supply of more than 5,000,000 U. S. wine gallons of ethyl alcohol that was suitable for human consumption and usable in the manufacture or production of medicines, medicinal preparations, food products, flavors, or flavoring extracts.

On August 7, 1953, USI sold to the plaintiff 7,620.20 proof gallons of the ethyl alcohol that resulted from the

chemical treatment and additional distillation mentioned in the preceding paragraph. In making this sale, USI impliedly warranted (among other things) that the ethyl alcohol sold to the plaintiff constituted nonbeverage drawback spirits. A tax was paid by USI to the Internal Revenue Service at the rate of $10.50 per proof gallon, or in the total amount of $80,012.10, in connection with the delivery of the 7,620.20 proof gallons of ethyl alcohol to the plaintiff. The purchase price which the plaintiff paid to USI for this ethyl alcohol included the amount of the tax.

Thereafter, during August and September of 1953, the plaintiff used 6,073.20 proof gallons of this tax-paid ethyl alcohol in the manufacture and production of flavoring extracts. Such flavoring extracts were unfit for beverage purposes.

The plaintiff later filed with the Internal Revenue Service in October 1953 a claim under section 3250 (*l*) of the Internal Revenue Code of 1939, as amended, for a drawback of the tax previously paid on the 6,073.20 proof gallons of ethyl alcohol referred to in the preceding paragraph. The claim was rejected by the administrative agency on the ground that the ethyl alcohol in question was imported and not "produced in a domestic registered distillery or industrial alcohol plant," as required by section 3250 (*l*). The amount of the drawback claimed on this ethyl alcohol was $57,695.40.

The administrative rejection of the plaintiff's claim was followed by the institution of the present suit alleging plaintiff's entitlement to a drawback under section 3250 (*l*)[2]. Defendant generally denied its liability to plaintiff for a drawback and affirmatively defended on the ground that plaintiff has no interest in this action and that the real party in interest is USI. Because defendant's affirmative defense, if proven, would bar plaintiff's recovery without going into

[2] A second cause of action in plaintiff's petition alleging liability on the ground that defendant misled plaintiff into believing it was purchasing distilled spirits which were eligible for drawback has apparently been abandoned since no evidence on this point was presented at the trial and it has not been briefed to the court.

the merits of the claim, we think it advisable to discuss this question first.

The defendant's contention concerning the plaintiff's alleged ineligibility to maintain this suit is apparently based upon the provision in rule 20(a) of the Rules of this court to the effect that:

> Every action shall be prosecuted in the name of the real party in interest * * *.

It appears that the present suit is being prosecuted for the plaintiff by and at the expense of USI; that in November 1953 USI paid to the plaintiff $57,695.40 in order to "secure" the ultimate payment of the plaintiff's claim against the defendant; that if the plaintiff should lose the present suit, it would be entitled to keep the $57,695.40 previously paid by USI as "security"; and that if the plaintiff should win the suit, it would be obligated to refund the $57,695.40 to USI.

Because the plaintiff's actual financial situation will not be affected either favorably or unfavorably by the outcome of the litigation, the defendant contends that the plaintiff is not entitled to maintain this suit.

In the absence of an allegation and supporting evidence from the defendant that the plaintiff has corruptly practiced or attempted to practice fraud against the United States in the proof, statement, establishment, or allowance of the claim involved in this litigation, there is not presented in the case any question relative to the possible forfeiture of the plaintiff's claim under 28 U. S. C. 2514. *The Globe Works* v. *United States*, 45 C. Cls. 497, 508 (1910).

The plaintiff's claim against the defendant came into existence when the plaintiff used in the manufacture and production of flavoring extracts 6,073.20 proof gallons of tax-paid ethyl alcohol. There is nothing in the evidence to indicate that the plaintiff has renounced the claim or validly assigned it to anyone else. Hence, the plaintiff is the present owner of the claim and "the real party in interest" in the present suit for the recovery of the amount of the claim.

We turn now to the merits of plaintiff's claim for a section 3250 (*l*) drawback on the ethyl alcohol it used in the manufacture of flavoring extracts. As previously noted the issue turns on the answer to the question of whether the alcohol was produced foreign or domestically. If it was produced in a registered domestic industrial alcohol plant, as contended for by the plaintiff, then the right to a drawback has been established. However, if the alcohol was "produced," as that word is used in section 3250 (*l*), in a foreign country and imported into the United States, then no provision of law provided for a drawback allowance.[3]

Unfortunately section 3250 (*l*) does not give us a definition of the word produced but plaintiff maintains that it must mean "the production by one means or another of a special grade of ethyl alcohol fit for the specific uses set forth in this section," *i. e.*, medicines, medicinal preparations, food products, flavors, or flavoring extracts unfit for beverage purposes. The record conclusively shows that the alcohol as imported by USI was unfit for any of the purposes described in section 3250 (*l*). It was only after the added redistillation process induced by USI that the alcohol was suitable for the specified purposes. Thus plaintiff says the alcohol it purchased was not "produced" under section 3250 (*l*) until after the redistillation by USI and since USI is a domestic registered industrial alcohol plant it is entitled to a drawback.

Defendant counters this argument by contending that any act performed by USI was merely a process of refining or purifying distilled spirits which had been produced

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[3] Section 5131 (a) of the Internal Revenue Code of 1954, similar to section 3250 (*l*) of the 1939 Code, was amended by the Excise Tax Technical Changes Act of 1958, P. L. 85—859, to make eligible for a drawback alcohol imported into the United States and transferred from customs custody to industrial alcohol bonded warehouses. S. Rep. No. 2029, 85th Cong., 2d Sess., states: "• • • This subsection eliminates the existing discrimination against the use of such imported distilled spirits subject to drawback in the manufacture of nonbeverage products by providing for the use of any distilled spirits withdrawn from the bonded premises of a distilled spirits plant."

abroad and were already in existence. Defendant cites us to section 2809 (b)(1) of the Code which provides:

> *General Definition.*—Distilled spirits, spirits, alcohol, and alcoholic spirits, within the true intent and meaning of this chapter, is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses, or sugar, including all dilutions and mixtures of this substance.

Since the process performed by USI was not a fermentation of material for the production of alcohol, it is contended there was no production within the meaning of section 3250(*l*). For further authority defendant shows us section 2800(c) which provides that the tax on alcohol attaches as soon as it comes into existence as such and not after purification. The alcohol imported by USI was 190 proof ethyl alcohol and subject to the tax and thus defendant maintains that it had already been produced within the meaning of the Code, and since the production was not by a domestic alcohol plant no drawback is available.

Section 3250 (*l*) is not a provision relating to a refund of a tax assessed and collected by the Government, but is a privilege or benefit bestowed upon those using taxable alcohol for nonbeverage purposes. Since it is a privilege or benefit, "it is to be construed in favor of the government and against the party claiming the grant." *United States* v. *Walker-Hill Co.*, 79 F. Supp. 482. In the instant case, merit can be found in both parties definition of the word "produced." However, bearing in mind the nature of a drawback, we reach the conclusion contended for by the defendant primarily on the definitions of distilled spirits found in section 2809(b)(1), quoted *supra*, and the definition of alcohol in section 3124(a)(1) which says:

> The term "alcohol" means that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, from whatever source or whatever process produced.

Applying sections 2809(b)(1) and 3124(a)(1) there can be no question that the 190 proof ethyl alcohol imported by USI was produced within the meaning of those sections prior to its purification or redistillation. It is true as plaintiff points out that sections 2809(b)(1) and 3124(a)(1) are contained in Chapter 26 of the Code, whereas section 3250 (*l*) is found in Chapter 27. In *Aetna Insurance Co.* v. *United States*, No. 281-52, decided March 5, 1958, this court held that the different sections of the Code dealing with refunds of tax on distilled spirits and industrial alcohol, which were in the same chapter but different subchapters, were not so interrelated as to require that they be read in *pari materia*. There we found a logical distinction between refunding taxes on distilled spirits and industrial alcohol which necessarily required that the refund pertaining to each should be read without reference to the other. Here, however, section 3250 (*l*) provides for a drawback on non-beverage distilled spirits produced in a domestic distillery or industrial alcohol plant subject to the taxing provisions of Chapter 26. We can think of no more logical place to look for guideposts in determining the meaning of "produced" than the definitions contained in a chapter of the Code which itself gives rise to the tax on alcohol upon which a drawback is claimed.

Furthermore, were we not convinced that Chapter 26 definitions should be controlling we would independently reach the same result. Obviously drawbacks were limited to distilled spirits produced in this country in order to protect our own distilleries and plants from foreign competition. If we construed "produced" to mean pure to the extent needed for medicines or extracts, the door would be thrown open for drawbacks in circumstances clearly unintended by the statute. A slight amount of poisonous or noxious material could be induced into pure ethyl alcohol prior to importation which would only require a simple distillation process to remove. Under plaintiff's basic theory, the process of removing the undesirable material would be a production and a drawback would be allowable.

Clearly, this would be a complete frustration of the statute's intent to limit drawbacks to domestic producers only. In this case, of course, a large amount of impure foreign matter was contained in the imported alcohol which required an extensive process to remove, but it nevertheless was alcohol at the time it was imported. We do not think it ever was the intention of Congress, or anyone else, that a court should have to determine degrees of impurity in order to say that domestic redistillation of imported alcohol amounted to a production under section 3250 (*l*). If the alcohol is taxable as alcohol at the time of its importation, then it has been "produced" within the meaning of section 3250 (*l*) and a further distillation process, no matter how extensive, will not convert it into domestically produced alcohol.

It follows that the alcohol used by plaintiff in the manufacture of extracts was distilled spirits not produced domestically for which no drawback can be allowed.

Plaintiff's petition will be dismissed.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge,* and JONES, *Chief Judge,* concur.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Mastin G. White, and the briefs and argument of counsel, makes findings of fact as follows:

1. (a) McCormick & Company, Incorporated (which will usually be referred to in these findings as "the plaintiff"), is now, and at all pertinent times was, a corporation duly organized and existing under the laws of the State of Maryland, with its principal place of business located at 414 Light Street, Baltimore, Maryland.

(b) During the fiscal year July 1, 1953-June 30, 1954, the plaintiff was a qualified drawback user of alcohol pursuant to Section 3250 (*l*) of the Internal Revenue Code of 1939, as amended, having previously paid for and being the

holder of a special tax stamp permitting withdrawals of distilled spirits to be used by the plaintiff at 414 Light Street, Baltimore, Maryland, in the manufacture of flavoring extracts.

2. (a) The U. S. Industrial Chemicals Company (which will usually be referred to in these findings as "USI") is now, and at all pertinent times was, a division of the National Distillers & Chemical Corporation (which was known in 1953 under the name of National Distillers Products Corporation). The National Distillers & Chemical Corporation is a corporation organized and existing under the laws of the State of Virginia, with its principal place of business located at 99 Park Avenue, New York, New York.

(b) At all times relevant to this action, USI operated a domestic registered industrial alcohol plant and a contiguous domestic registered industrial alcohol bonded warehouse at Curtis Bay, Baltimore, Maryland, under 26 CFR, Part 182.

3. In 1953, Section 3125 (a) of the Internal Revenue Code of 1939, as amended, provided in pertinent part that:

> • • • alcohol of 160 proof, or greater, may be imported into the United States and be withdrawn, in bond, from customs custody, without payment of the internal-revenue tax imposed by section 2800 upon the act of importing such alcohol, for transfer to industrial alcohol plants, alcohol bonded warehouses, and denaturing plants for redistillation or denaturation and withdrawal, or withdrawal without redistillation or denaturation, tax free or tax paid, as the case may be, for all the [industrial] purposes authorized by this part. • • •

4. Acting in accordance with the authorization contained in Section 3125 (a) of the Internal Revenue Code of 1939, as amended (see finding 3), USI entered into a contract with the Justfrank Company, a California corporation, on June

2, 1953. The contract covered the sale by the Justfrank Company and the purchase by USI of:

> • • • approximately 5,675,000 U. S. wine gallons of ethyl alcohol, at 190 U. S. proof, of which 3,275,000 gallons is stored in Le Havre, France and 2,400,000 is stored in Rouen, France.

It was provided in the contract that the ethyl alcohol should be delivered to USI at its Curtis Bay plant. The contract prescribed various specifications, in addition to the matter of proof, which the ethyl alcohol should meet.

5. During June and July of 1953, the Justfrank Company shipped or caused to be shipped to USI from France, purportedly in accordance with the contract dated June 2, 1953, a total of 5,583,529 U. S. wine gallons of impure ethyl alcohol. This ethyl alcohol failed to meet a number of the specifications prescribed in the contract. It did, however, meet the requirement of the contract as to proof.

6. Although the ethyl alcohol furnished to USI under the contract of June 2, 1953 failed to meet a number of the specifications prescribed in the contract, the ethyl alcohol was accepted by USI when it was tendered for delivery at USI's Curtis Bay plant. Because of the presence in the ethyl alcohol of impurities, particularly excessive amounts of methyl alcohol (methanol), amyl alcohol, and nonvolatile residue, the ethyl alcohol, at the time when it was delivered to and received by USI, was not suitable for human consumption, and it was not usable in the manufacture or production of medicines, medicinal preparations, food products, flavors, or flavoring extracts.

7. Shortly after the receipt by USI of the impure ethyl alcohol referred to in findings 5 and 6, such material was processed by USI in its domestic registered industrial alcohol plant at Curtis Bay. The processing consisted, first, of a chemical treatment in order to make the excessive impuri-

ties in the ethyl alcohol susceptible of removal through further distillation, and, second, of an additional distillation procedure, unusually complicated in nature, for the removal of the excessive impurities.

8. As a result of the chemical treatment and additional distillation mentioned in finding 7, USI produced from the impure ethyl alcohol referred to in findings 5 and 6 more than 5,000,000 U. S. wine gallons of ethyl alcohol that was suitable for human consumption and was usable in the manufacture or production of medicines, medicinal preparations, food products, flavors, or flavoring extracts.

9. (a) On August 7, 1953, USI sold to the plaintiff 7,620.20 proof gallons of the ethyl alcohol that resulted from the processing mentioned in finding 7. A tax was paid by USI to the Internal Revenue Service at the rate of $10.50 per proof gallon, or in the total amount of $80,012.10, in connection with the delivery of the 7,620.20 proof gallons of ethyl alcohol to the plaintiff. The purchase price which the plaintiff paid to USI for this ethyl alcohol included the amount of such tax.

(b) In making the sale referred to in paragraph (a) of this finding, USI impliedly warranted (among other things) that the ethyl alcohol sold to the plaintiff constituted non-beverage drawback spirits.

10. During the period between August 7 and September 30, 1953, the plaintiff used in the manufacture and production of flavoring extracts 6,073.20 proof gallons of the tax-paid ethyl alcohol which it had purchased from USI on August 7, 1953. Such flavoring extracts were unfit for beverage purposes.

11. On or about October 1, 1953, the plaintiff filed with the Internal Revenue Service a claim in the amount of $305,938 under Section 3250 (*l*) of the Internal Revenue Code of 1939, as amended, for drawback of tax on distilled spirits used during the quarter-year July-September 1953

in the manufacture of nonbeverage products. This claim was based to the extent of $57,695.40 on the use for the purpose indicated in finding 10 of 6,073.20 proof gallons of the ethyl alcohol which the plaintiff had purchased from USI on August 7, 1953.

12. The plaintiff's claim for drawback mentioned in finding 11 was allowed in part and rejected in part by the Internal Revenue Service on or about October 26, 1953. To the extent of $57,695.40, the partial rejection of the claim was based upon a determination by the Internal Revenue Service that the 6,073.20 proof gallons of ethyl alcohol which the plaintiff had purchased from USI on August 7, 1953 and used in the manufacture of flavoring extracts comprised "imported alcohol" rather than ethyl alcohol produced in a domestic registered distillery or industrial alcohol plant.

13. (a) In a letter dated November 19, 1953 from USI to the plaintiff, it was stated in part as follows:

> • • • We very much regret that your claim for drawback of Internal Revenue Tax on the alcohol covered by our Invoice No. 45-2336 has been disallowed by the Alcohol & Tobacco Tax Unit. This is to advise you that our lawyers are endeavoring to have this ruling reversed, if necessary by legal action.
>
> So that you may not be inconvenienced in the meantime, we enclose our check for $57,695.40 to secure the payment of your claim for drawback of Internal Revenue Tax on alcohol charged to you on our Invoice No. 45-2336 when used as provided in Regulations 29. It is understood between us that in the event there is a final ruling by the Internal Revenue Department under which your claim for drawback is approved and you are paid the amount due as drawback on the alcohol covered by our Invoice No. 45-2336 as provided by law and Regulations 29, then you agree to refund to us the $57,695.40 which is given to you by us as a security only.

It is further agreed that in the event the Internal Revenue Department does not approve and pay your claim for drawback on alcohol charged to you on our Invoice No. 45-2336 when used by you as provided in Regulations 29 you agree to permit us to institute suit in court in your name at our expense to recover the said drawback. In the event the suit thus instituted results in a decision in your favor and you are paid the amount of your claim for drawback, then you agree to refund to us $57,695.40 which is given to you as a security only. In the event the suit thus instituted results finally in a decision in favor of the Internal Revenue Department then the $57,695.40 which is given herewith as a security will become your property.

(b) The proposal quoted in paragraph (a) of this finding was accepted by the plaintiff on November 23, 1953.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover, and the petition is therefore dismissed.

Appendix B.

Section 3250(*l*), Title 26 U. S. C., Chapter 27, Internal Revenue Code of 1939 as amended:

(l) Manufacturers or producers of designated non-beverage products

(1) *In general.* Any person using distilled spirits produced in a domestic registered distillery or industrial alcohol plant and fully tax-paid in the manufacture or production of medicines, medicinal preparations, food products, flavors or flavoring extracts which are unfit for beverage purposes, upon payment of a special tax per annum, shall be eligible for drawback at the time when such distilled spirits are used in the manufacture of such products and as hereinafter provided for.

(2) [*Rate of tax.*] Such special tax per annum shall be graduated in amount as follows: (a) for total annual withdrawals not exceeding 25 proof gallons, $25 per annum; (b) for total anual withdrawals not exceeding 50 proof gallons, $50 per annum; (c) for total annual withdrawals of 50 proof gallons or more, $100 per annum.

(3) *Requirements.* Such person shall register annually with the Commissioner; keep such books and records as may be necessary to establish the fact that distilled spirits purchased by him and fully tax-paid were used in the manufacture or production of medicines, medicinal preparations, food products, flavors, or flavoring extracts which were unfit for use for beverage purposes; and shall be subject to such rules and regulations in relation thereto as the Commissioner, with the approval of the Secretary, shall prescribe to secure the Treasury of the United States against frauds.

(4) *Investigative Powers of Commissioners.* The Commissioner, for the purpose of ascertaining the correctness of any claim filed under this subsection is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that pur-

pose, to examine any books, papers, records or memoranda bearing upon the matters required to be alleged in the claim, and may require the attendance of the person filing the claim or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to any matter covered by the claim, with power to administer oaths to such person or persons.

(5) *Drawback.* In the case of distilled spirits tax-paid and used as provided in this subsection, a drawback shall be allowed——

(A) At the rate of $6 on each proof gallon upon which tax is paid at a rate of $9 per proof gallon prior to the effective date of section 462 of the Revenue Act of 1951,

(B) at the rate of $9.50 on each proof gallon upon which tax is paid at a rate of $10.50 per proof gallon on and after the effective date of section 462 of the Revenue Act of 1951, and

(C) at the rate of $8 on each proof gallon upon which tax is paid at a rate of $9 per proof gallon after March 31, 1955.

Such drawback shall be due and payable quarterly upon filing of a proper claim with the Secretary; except that, where any person entitled to such drawback shall elect in writing to file monthly claims therefor, such drawback shall be due and payable monthly upon filing of a proper claim with the Secretary: *Provided, however,* That the Secretary may require persons electing to file monthly drawback claims to file with him a bond or other security in such amount and with such conditions as he shall by regulations prescribe. Any such election may be revoked upon filing of notice thereof with the Secretary. No claim under this subsection shall be allowed unless filed with the Secretary within the three months next succeeding the quarter in which the distilled spirits covered by the claim were used as provided in this subsection.

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JAMES R. BROWNING

No. 900

In the Supreme Court of the United States

OCTOBER TERM, 1958

McCORMICK & COMPANY, INCORPORATED, PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. 18–26) is reported in 170 F. Supp. 427.

JURISDICTION

The judgment of the Court of Claims was entered on February 11, 1959. (Pet. 18.) The petition for a writ of certiorari was filed on May 8, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255(1).

QUESTION PRESENTED

Whether 190 proof ethyl alcohol imported from France and redistilled in the United States to remove excessive impurities rendering it unfit for consump-

tion was "produced" in the United States for purposes of Section 3250(1) of the Internal Revenue Code of 1939.

STATUTE INVOLVED

Internal Revenue Code of 1939 (as amended, 26 U.S.C., 1952 ed.):

> SEC. 3250. * * * (l) * * *—(1) *In general.* Any person using distilled spirits produced in a domestic registered distillery or industrial alcohol plant and fully tax-paid in the manufacture or production of medicines, medicinal preparations, food products, flavors, or flavoring extracts which are unfit for beverage purposes, upon payment of a special tax per annum, shall be eligible for drawback at the time when such distilled spirits are used in the manufacture of such products and as hereinafter provided for.

STATEMENT

The United States Industrial Chemicals Company ("USI"), the operator of a domestic registered industrial alcohol plant, imported from France a large quantity of 190 proof ethyl alcohol. Because of the presence in the imported alcohol of impurities, particularly excessive amounts of methyl alcohol, amyl alcohol, and nonvolatile residue, it was not suitable for human consumption or for use in the manufacture of medicinal preparations, flavoring extracts, or food products. To remove the excessive impurities, USI subjected the alcohol to a chemical treatment (to make the impurities susceptible of removal by distillation) and to a complicated distillation procedure. Part of the alcohol so purified was sold to petitioner. In Au-

gust and September 1953, petitioner used 6073.20 proof gallons of the alcohol in the manufacture of flavoring extracts. (Pet. 19–21.)

A tax at the rate of $10.50 per proof gallon had been paid on the alcohol by USI (Pet. 21). Petitioner sought a drawback of the tax paid under Section 3250(l) of the Internal Revenue Code of 1939, which allows such a drawback to any person using "distilled spirits produced in a domestic registered distillery or industrial alcohol plant" in the manufacture of, *inter alia*, flavoring extracts. The Court of Claims held that the alcohol was not "produced" in the United States and hence that petitioner was not entitled to a drawback. (Pet. 23–26.)

ARGUMENT

As grounds for granting the writ, petitioner asserts that the decision below is in conflict with several decisions of this Court and with a state court decision (Pet. 4–9), is based on an error of statutory construction (Pet. 9–13) and on an unconstitutional statute (Pet. 13–15), and that the question presented is one of general importance (Pet. 15–17). These assertions are all lacking in merit.

1. The alleged conflicts with decisions of this Court are nonexistent, since the cited decisions all involved different questions and in relation to different statutory provisions. *Saltonstall* v. *Wiebusch*, 156 U.S. 601, held only that imported carpenters' pincers, scythes and grass-hooks were classifiable as "forgings of iron and steel", or "forged iron" for import duty purposes. *Tide Water Oil Co.* v. *United States*, 171 U.S. 210, held that imported boxes or cases were not

"wholly manufactured" within the United States although their manufacture was completed in this country. *Anheuser-Busch Assn.* v. *United States,* 207 U.S. 556, related to a statute entitling an exporter to a drawback of the tax paid on imported raw material "used in the manufacture of articles manufactured or produced in the United States" (p. 559) and held that corks imported from Spain and used in bottling beer were *not* manufactured in the United States merely because, after their importation, they were subjected to a cleaning and coating process to adapt them to use. In that case the Court stated (p. 562) that, to have manufacturing or production, "There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use.'" *Fruit Growers Inc.* v. *Brogdex Co.,* 283 U.S. 1, was a patent infringement suit in which the Court quoted the latter language from *Anheuser-Busch Assn.* v. *United States, supra,* and held (p. 11) that the addition of borax to the rind of natural fruit "does not produce from the raw material an article for use which possesses a new or distinctive form, quality, or property." *Kidd* v. *Pearson,* 128 U.S. 1, involved constitutional questions as to the validity of a state statute prohibiting the importation of liquor into the state and sales outside the state of liquor manufactured in the state. The decision is pertinent only for its statement (p. 20) that "Manufacture is transformation—the fashioning of raw materials into a change of form for use." *United States* v. *E. C. Knight Co.,* 156 U.S. 1, was an antitrust suit in which the latter language from *Kidd* v. *Pearson, supra,* was

quoted (p. 147). *East Texas Lines* v. *Frozen Food Exp.*, 351 U.S. 49, held that frozen dressed poultry is an "agricultural" commodity, not a "manufactured" product thereof, for the purposes of the Interstate Commerce Act. Quoting from *Anheuser-Busch Assn.* v. *United States, supra*, the Court again reiterated (p. 53) that, for manufacturing, "There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use.'" In that case the Court also stated (p. 54) that a commodity has not been "manufactured" where it "retains a continuing substantial identity through the processing stage."

The decision below is in full accord with the above cases insofar as they reflect a general rule for determining what constitutes "manufacturing" or "production." The inquiry here is whether the distilled spirits used by the petitioner were "produced" in the United States within the meaning of Section 3250(1) of the Internal Revenue Code of 1939, *supra*, p. 2. As the court below noted (Pet. 24), "Distilled spirits" are defined in Section 2809(b)(1) as "that substance known as ethyl alcohol * * *, which is commonly produced by the fermentation of grain, starch, molasses, or sugar * * *." The substance which USI imported from France was ethyl alcohol which had been produced by the fermentation of raw materials. Prior to the time the ethyl alcohol was received in this country, redistilled by USI to remove impurities, and sold to petitioner, there had been a "transformation" of the raw materials into a "new and different article, * * * 'having a distinctive name, character or use,'"

as well as a "fashioning of raw materials into a change of form for use," which are the tests of "manufacturing" stated in the decisions of this Court noted above. That the ethyl alcohol had to be purified by redistillation before it could be used to manufacture consumable articles did not change its character as ethyl alcohol. Petitioner is simply assuming, erroneously (cf. *Anheuser-Busch Assn.* v. *United States, supra; Fruit Growers, Inc.* v. *Brogdex Co., supra*), that a process applied to an article to adapt it to a particular use constitutes "production." Processing is *not* manufacturing or production when the processed article retains "a continuing substantial identity through the processing stage". *East Texas Lines* v. *Frozen Food Exp., supra,* 351 U.S. at 54.

2. The decision below is not in conflict with *American Distilling Co.* v. *State Board of Equalization,* 144 Cal. App. 2d 457, another case cited by petitioner. That case involved a California statute allowing the sale in the State of "distilled spirits originally distilled in this state * * *" (p. 461). It was there held that the distilled spirits involved were originally distilled in California although only the redistillation of impure alcohol imported from Illinois occurred in California. The reason for that holding, however, was that the California statute defined "distilled spirits" as meaning an "alcoholic beverage" (*id.*, p. 460). In contrast, as already noted, the federal definition of "distilled spirits" is not so limited.

3. The error of statutory construction which petitioner asserts the court below committed (Pet. 9-13) consists simply of giving recognition to the definitions

of "distilled spirits" and "alcohol" contained in the Code (see Pet. 24–25). Those definitions are contained in Chapter 26 of Subtitle B which, in Section 2800(a), imposes the tax on "distilled spirits * * * produced in or imported into the United States", whereas the Section 3250(1) provision for a drawback of the tax is in Chapter 27 of Subtitle B. But the court below was clearly correct in stating (Pet. 25) that there "is no more logical place to look for guideposts in determining the meaning of 'produced' than the definitions contained in a chapter of the Code which itself gives rise to the tax on alcohol upon which a drawback is claimed." In any event, the decision below was not based solely on the statutory definitions of "distilled spirits" and "alcohol." The court stated that it would "independently reach the same result" even if it were not convinced that the definitions were controlling (Pet. 25), because a holding that the removal of undesirable material constitutes production "would be a complete frustration of the statute's intent to limit drawbacks to domestic producers only" (Pet. 26).

4. Petitioner asserts (Pet. 13–15) that Section 3250(1) of the 1939 Code is unconstitutional because, in connection with the amendment of a similar 1954 Code provision so as to allow the drawback on imported distilled spirits, the legislative reports stated that the amendment would eliminate "existing discrimination." The assertion of unconstitutionality is plainly frivolous. This was simply a change in legislative policy. What Congress chooses to call

"discrimination" is not necessarily unconstitutional discrimination.

5. No important question is presented requiring settlement by this Court. Insofar as general principles of law are pertinent, the applicable principles have already been supplied by the decisions of this Court already noted (*supra*, pp. 3–5). The decision below is correct, we submit, and, contrary to petitioner's assumption (Pet. 16), there is no particular "confusion" to be resolved by this Court either in relation to this case or to the allegedly "innumerable" cases involving successive stages of production or manufacture in relation to other statutes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1959.

U.S. GOVERNMENT PRINTING OFFICE: 1959

FILE COPY

Office-Supreme Court, U.
FILED
JUN 10 1959
JAMES R. BROWNING, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 900.

McCORMICK & COMPANY, INCORPORATED,

Plaintiff-Petitioner,

against

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

REPLY BRIEF OF PLAINTIFF-PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 900.

McCORMICK & COMPANY, INCORPORATED,
Plaintiff-Petitioner,

against

UNITED STATES,
Respondent.

REPLY BRIEF OF PLAINTIFF-PETITIONER.

POINT I.

Additional reasons specially applicable to judgments of the Court of Claims why the writ should be granted under this Court's supervisory powers.

A.

The lower Court's misapprehension of the real issue and the insufficiency of its findings to support its conclusions which produced conflict with this Court's decisions and warrants granting of the writ.

The issue here is not what constitutes "distilled spirits" within the statutory definition of Chapter 26. Neither is the issue what is meant in common parlance by "distilled spirits" in the broadest generic sense of these

words apart from statutory definition. Both these exhaust the entire content of "distilled spirits" and include substances which are both commercially unusable and also totally unfit for human consumption.

Within each of these accepted meanings, however, there are various and different types of distilled spirits. The real question, therefore, is what type of distilled spirits is being talked about in the statute in question in this case. Necessarily it cannot be the type of poisonous unmerchantable substance represented by this batch of imported impure ethyl alcohol though for other purposes and in other contexts that poisonous substance might satisfy some one of the broad range of meanings of which the words "distilled spirits" are susceptible. Necessarily, in the context of the particular statute in which the phrase "distilled spirits" is employed here, in the absence of a definition in that statute,* that type of "distilled spirits" is meant whose uses the statute contemplates and with which particular uses the statute deals. The intended statutory uses perform precisely the same office as the statutory definition of distilled spirits as an alcoholic beverage did in the California statute construed by the Court in *American Distilling Co.* v. *State Board of Equalization* (Petition p. 8). Whatever is required to create that type of "distilled spirits" constitutes their production for the statutory purposes.

The lower Court in its Opinion and Findings tacitly recognizes, though it fails overtly to acknowledge, this proposition's irrefutable force. In describing the transformatory treatment to which this poisonous imported substance was domestically subjected the Court was

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* Questions involving this issue may still arise despite the prospective amendment of the statute because the statute, even as amended, still contains no definition of distilled spirits.

forced to use language flatly characterizing that treatment as constituting production (App. Finding 8, p. 29).

Fatal to the Court's conclusion is the fact that it made no finding that the imported poisonous substance had previously been subjected to a distillation process so as to make it distilled spirits even in the statutory sense of Chapter 26. Nor is there any finding of what processes the imported substance had previously undergone.* The Defendant's Brief p. 5 does not assert a previous distillation. The radical nature of the processes to which the substance was, however, domestically subjected is proof that the original treatment—whether by distillation or otherwise—was at best only partial and uncompleted so that no original full distillation resulting in the production of true distilled spirits had ever taken place.

These intensive, transformatory processes which took place here domestically therefore constituted "production" as defined by this Court's decisions cited in the Petition (pp. 4-7). The conflict of the lower Court's opinion with the criteria there laid down is one of the bases on which review by this Court is sought. The Defendant's Brief does not seriously dispute Plaintiff's statement of those criteria but only their application.

B.

The lower Court's fundamental mistake as to the parties intended by the statute to receive the benefit of the drawback which warrants review by this Court.

Defendant's Brief (p. 7) relies on the Court's mistaken statement (Opinion, App. 26) concerning "the statute's

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* This Court granted certiorari to the Court of Claims in *U. S.* v. *Penn Mfg. Co.* 335 U. S. 857 and reversed that Court's decision in *U. S.* v. *Penn Mfg. Co.* 337 U. S. 198 for similar insufficiency of its findings to support its conclusions, and in *U. S.* v. *Causby* 328 U. S. 256, 267 held that a deficiency in that Court's findings could not be rectified by statements in its opinion.

intent to limit drawbacks to domestic producers only". Of course the drawback is not granted to the domestic *producer of the distilled spirits;* it is allowed by the Section's terms to the *manufacturer using distilled spirits in the specified non-beverage products* whose domestic production it is the statute's objective to encourage. (Section 3250(1), App. B and *U. S. Walker-Hill Co.*, 79 F. Supp. 482, 485). This mistake on the Court's part is so fundamental and was so fatal to its proper comprehension and construction of the statute, as of itself alone to require review by this Court under its supervisory powers.

Problems concerning the party eligible for the drawback have arisen in the past (*Hoffman Beverage Co.* v. *U. S.*, 119 Court of Claims 803, 71 F. Supp. 147) and will arise despite the prospective amendment of the statute in the future. A correct determination of that issue is therefore important to the administration of the statute.

C.

The lower Court's basic misconception of the nature of a drawback which resulted in its illiberal and erroneous construction of the statute and is of general importance warranting review by this Court.

"In the instant case", said the Court, "*merit can be found in both parties' definition of the word 'produced'.* However, *bearing in mind the nature of a drawback* we reach the conclusion contended for by the defendant primarily on the definitions of distilled spirits found in Section 2809(b) (1), quoted *supra*, and the definition of alcohol in Section 3124(a) (1) * * *". (App. 24) (emphasis added). The Court's understanding of the nature of a drawback is derived from a District Court's decision (cited Opinion App. 24) characterizing a drawback as "a governmental grant of a privilege and benefit" * * * "to

be construed in favor of the government and against the party claiming the grant". The cited case is at variance with this Court's decisions interpreting the various drawback statutes set forth in the Petition (pp. 4-6) which impose no such strict canon of construction and with the decisions of this Court hereafter discussed. The lower Court's rule of construction here is also at variance with its own decision in *Hoffman Beverage Co.* v. *U. S.* 119 Ct. of Claims 803, 71 F. Supp. 147, in which it held that this same drawback statute should be construed in favor of "all those who came within its equity" (151) and (152) denied a "narrow construction" that would result in purposeless discrimination.

The lower Court, *though expressly conceding the merit of Petitioner's construction of the statute,* was misled into giving to the statute here—condemned by the legislature as itself arbitrary and discriminatory—the still further strict construction which it did by a misconception of the nature of a drawback so fundamental as in itself to warrant review by this Court. A drawback whether denominated as a bounty or a bonus, is not, as the lower Court's opinion holds, a mere legislative gratuity or act of grace; *Kenicott* v. *The Supervisors,* 83 U. S. 452, 471; *Iowa* v. *McFarland,* 110 U. S. 471, 479; *U. S.* v. *Realty Co.,* 163 U. S. 427, 435, 440; *U. S.* v. *Cook,* 257 U. S. 523, 526; *Edwards* v. *Cuba Railroad,* 268 U. S. 628, 632; *Cincinnati Soap Co.* v. *U. S.,* 301 U. S. 308, 317. The object of a drawback is to encourage certain types of manufacture or production regarded by the legislature as important to the general economy. *U. S.* v. *Passavant,** 169 U. S. 16, 23, 24,

* In that case this Court, speaking through Chief Justice Fuller, said, in equating the concept of "bonification of tax" with that of a drawback, "It is a special advantage extended by government in aid of manufacture and trade, having the same effect as a bonus or

25; *Downs* v. *U. S.*, 187 U. S. 496; *Nichols* v. *U. S.*, 249 U. S. 34. Drawbacks are intended as a stimulus and legislative reward inducing specific action thought to be socially beneficial. By the same token Courts should and do protect action taken in good faith reliance on the statutory reward. *U. S.* v. *Realty Co.*, 437, *supra.* As in the case of similar legislative grants, courts may not deny the statute "a fair and reasonable interpretation, or justify the withholding of that which it satisfactorily appears the grant was intended to convey"; *Russell* v. *Sebastian*, 233 U. S. 195, 205 especially where, as here, the grant flows not from the solicitation of the grantee but from the government's own motion. The public and the private manufacturer both have interests in seeing that the legislative purpose is accomplished, which this Court should uphold against a decision of a court of first instance frustrating that purpose. "The provision is a part of a taxing statute; and such laws are to be interpreted liberally in favor of the tax payers"; *Bowers* v. *N. Y. & Albany Co.*, 273 U. S. 346, 350; *Crooks* v. *Harrelson*, 282 U. S. 55, 61.

The statement in the lower Court's opinion (App. 24) that "Section 3250(1) is not a provision relating to a refund of tax assessed and collected by the Government" would seem further to be in conflict with this Court's decision in *U. S.* v. *Passavant, supra*, p. 23 and with that of the Fourth Circuit Court of Appeals in *Downs* v. *U. S.*, 113 Fed. 144, p. 148, affirmed by this Court in *Downs* v. *U. S., supra*, and see *McGoldrick* v. *Compagnie Generale*, 309 U. S. 430,

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drawback. To use one of the definitions of drawback, it is a device resorted to for enabling a commodity affected by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed" (p. 23). There are, of course, many other kinds of drawback. This Court's opinions in this case and in the *Downs* and *Nichols cases, supra*, appear to emphasize the compensatory nature of the grant as a spur to industry or commerce.

432 characterizing the export drawback on oil under 19 U. S. C. Section 1313 as "a refund or drawback".

At all events drawbacks are important and of widespread occurrence* with an historic background of absorbing interest.** Their nature and function are deserving of precise definition by this Court if such a definition is not already supplied with sufficient clarity by this Court's previous decisions.

Settlement of the nature of a drawback and of the rules of construction applicable thereto remains essential under the statute in its amended as well as in its present form and also for the purposes of the export drawback on distilled spirits under Section 3179, 26 U. S. C. Internal Revenue Code of 1939 as amended.

D.

The lower Court's serious errors of statutory construction which are of general public consequence.

The lower Court was thus driven by its misconception of the function and nature of a drawback to place its decision, by a strict and erroneous construction of the statute, on plainly untenable grounds. Its decision was predicated squarely on the definition (quoted Opinion p. 24) of distilled spirits contained in Section 2809(b)(1) of a different statute, Chapter 26 of the Internal Revenue Act of 1939, and on its application of that definition, by an inept process of translation, to Section 3250(1) of Chapter 27. For the reasons advanced in the Petition the provisions of Section 3250(1) of Chapter 27 are neither ambiguous nor is

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* See The New International Encyclopedia, Second Edition, Article, "Drawback", and Index to U. S. C. "Drawbacks" listing drawback statutes applying to an enormous range of manufactured articles principally for export.

** See opinion in *Downs* v. *U. S.*, 113 Fed. 144 (4th Cir.), affd. by this Court, 187 U. S. 496.

Chapter 26 to which the Court below resorted in *pari materia*. See specifically the decision of this Court in *Seeberger* v. *Castro*, 153 U. S. 32, 36. In fact the Government in its brief below conceded that the language of the Section is plain and unambiguous (Defendant's Brief in Court of Claims p. 22). For both these reasons resort to such definition is therefore illegitimate.

In addition to these errors of statutory construction the definition on which the Opinion relies* is by its express terms limited to Chapter 26, the statute in which it is found—"*within the true intent and meaning of this chapter*". Emphasis added. (Section 2809(b)(1) quoted at p. 24 of the Opinion.)

The definition, further, on which the Court relied is contained in Chapter 26 which is a general statute. Chapter 27 in which the applicable Section 3250(1) is found is, on the other hand, a special statute limited to specific, narrowly restricted uses of distilled spirits and dealing with its special subject matter in a more detailed way. Under well recognized rules of statutory construction the provisions of such a general act are under such circumstances not controlling in interpreting those of such a special act. *MacEvoy* v. *U. S.*, 322 U. S. 102, 107. Such is particularly the case where, as here, other parts of the special statute (in contrast with the part in which the section here in question is contained) embody specific provisions reading into such other parts the provisions of the general taxing statutes (Petition p. 11).

Further, what is in fact a mere definition of a particular material thing contained in, and expressly restricted

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* The other definition on which the Court relied, Section 3124 (a)(1), quoted on the same page of its Opinion, is merely tautological and refers one back to the previous definition which is expressly limited to Chapter 26.

to, a different and a general statute is surreptitiously employed by the decision below to interpret the meaning in another and a special statute, not only of the thing itself, but of an operation performed upon it, i.e., production of that thing. This error is the more fatal because neither statute contains any definition of production; nor do the Regulations.

Since the undisputed testimony was (Tr. 70, 71, 102) that the imported material had no commercial use except as feed stock for the production of ethyl alcohol, it was raw, unmanufactured material within the express criteria laid down by this Court in *Seeberger* v. *Castro*, 153 U. S. 32, 35, until it was subjected to the domestic processes of production here. There this Court held that imported material not fit for use in the condition imported was unmanufactured material; that the meaning of that word, which is synonymous with "produced" (*Allen* v. *Smith*, 173 U. S. 389, 399), was "a thing made which is useful for its own sake and vendable as such", and that "To speak of it as 'partly manufactured' and deduce a contention therefrom, is simply to assume the question at issue", p. 36. With the principle of this Court's decision in that case (followed by this Court in *Spalding* v. *Castro*, 153 U. S. 38, 39; *Patton* v. *U. S.*, 159 U. S. 500, 509; *Latimer* v. *U. S.*, 223 U. S. 501, 503-4), the decision of the Court below is in direct conflict. The *Seeberger* case and the decisions of this Court cited in the Petition (4-7) specifically refute the Defendant's assertion in its Br. (p. 6) that it is error to "assume" "that a process applied to an article to adapt it to a particular use constitutes 'production' ". Production requires that the article must be "*useful* for its *own sake* and *vendable as such*" (*Seeberger* v. *Castro*, 35, *supra*). The distilled spirits, here domestically produced, possessed this property; the imported, impure, poisonous substance, fit *only* for feed

stock *for production of ethyl alcohol* (Tr. 70, 71, 102), did not. That there may have been one transformation (Defendant's Brief 5) does not preclude another from constituting new production (decisions of this Court, cited Petition pp. 4-6). It is conflict with the *principles, not the specific facts,* involved in those decisions which furnishes ground for certiorari.

Finally the Court below refused to give the words distilled spirits the meaning which their context in Chapter 27 impelled, failed to accord the word "produced" the meaning due it under the rule of this Court's decision in *Western Union* v. *Lenroot.* (Petition, p. 4) and which the prior decisions of this Court (Petition, pp. 4-6) have established, and violated the established rule that a taxing statute is to be strictly construed against the Government (*Bowers* and *Crooks* cases, *supra*). Where a taxing statute is susceptible, as the lower Court conceded here, of two constructions, that construction must be adopted which is most favorable to the tax payer. *McFeely* v. *Commissioner,* 296 U. S. 102, 111; *U. S.* v. *Merriam,* 263 U. S. 179, 188.

Regarded as a precedent, the lower Court's decision, at variance with the Commissioner's in the same case, represents a subtle erosion breaking down fundamental rules of statutory construction of general public consequence beyond the particular injury it inflicts on the Petitioner. It introduces confusion regarding the meaning of domestically "produced" not alone under the present statute but with respect to the meaning of that same word concerning export drawbacks on distilled spirits under Section 3179, 26 U. S. C., Internal Revenue Code of 1939 as amended.

E.

The lower Court's misstatement of plaintiff's basic theory which calls for the exercise of this Court's power of supervision.

The Court's opinion below contains the following suppositious statement:* "A *slight* amount of poisonous or noxious material could be induced into *pure* ethyl alcohol prior to importation which would only require a *simple* distillation process to remove. *Under plaintiff's basic theory,* the process of removing the undesirable material would be a production and a drawback would be allowable". (Opinion, App. 25) (emphasis added) This statement is wrong as well as uncalled for because the Court found that the imported substance was not "pure"; that the amounts of the poisonous substance, methanol, were not "slight" but "excessive"; and that the additional distillation process, which supplemented the chemical process, removing the poisonous substance and impurities was not "simple" but "unusually complicated in nature" (Finding 7, App. 28, 29). Thus the Court has made a fundamental misstatement of Petitioner's basic theory. By so doing and by the implications of its other statements in its Opinion (at Appendix p. 25-26) the lower Court has furnished further ground for allowance of the writ because it "has so far departed from the accepted and usual course of judicial proceedings" "as to call for the exercise of this Court's power of supervision" under the express terms of Rule 19 which includes these considerations among those governing review on certiorari.

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* It thus seems to have considered facts not in the record, warranting reversal under *Standard Vacuum Oil Co.* v. *U. S.* 339 U. S. 157, 160, 161.

F.

Existence of important questions, though present here, is not required for review of Court of Claims' decisions, especially where there exists a conflict with this Court's decisions.

This Court observes in the case of judgments of the Court of Claims a special and more liberal rule for review by certiorari. Where a decision of the Court of Claims is in conflict with that of a Court of Appeals, this in itself has been traditionally sufficient ground for certiorari irrespective of the importance of the question involved. *Cahn* v. *U. S.*, 297 U. S. 691. (See statement of this case, *Robertson and Kirkham*, "Jurisdiction of the Supreme Court of the United States", 1951, p. 721, footnote 1. Compare this Court's thirteen decisions cited in footnote 2, loc. cit. granting certiorari on the basis of conflict alone, and see *U. S.* v. *Olympic Radio & Television*, 349 U. S. 232, 233 and *U. S.* v. *Anderson, Clayton & Co.*, 350 U. S. 55, 57). Such, a fortiori, must also be the case where as here the decision sought to be reviewed is in conflict with this Court's own decisions. In *U. S.* v. *Standard Rice Co.*, 323 U. S. 106, 108, this Court granted certiorari to review a Court of Claims' decision for just such ground, namely conflict with this Court's decision in another case. This Court granted certiorari in *Reynolds* v. *U. S.*, 292 U. S. 443 to correct patent errors of the Court of Claims comparable to those committed by it in this case; and recently in *Dies* v. *New York Life Insurance Co.* (No. 58, May 18, 1959, not yet officially reported) to review similar errors by a Circuit Court of Appeals. Certiorari is also granted because of this Court's doubts as to correctness of the decision below. *Chatwin* v. *U. S.*, 326 U. S. 455, 459.

See also "Supreme Court Practice," by Robert L. Stern and Eugene Gressman, 2nd ed. 1954, p. 116 and

Supreme Court decisions cited. At pp. 137-138 it is stated with regard to review by this Court of the Court of Claims' decisions that "The issues arising in this type of litigation frequently have a unique importance which warrants review by the Supreme Court, inasmuch as so many of the legal responsibilities of the Government are determined solely in the Court of Claims. The possibility of conflict with decisions of other courts is minimized and the decisions of the Court of Claims alone would often settle the law in the absence of Supreme Court review. Certain issues thus acquire an importance justifying review, an importance which they would not otherwise have in the context of private litigation".* The Court of Claims, a court of first instance, would otherwise be automatically converted into a court also of last resort whose decisions would not be subjected to review.

It has also been the practice of this Court to grant the writ where the Government though maintaining the correctness of the result, believes that the reasoning of the Court of Claims cannot be sustained and is likely to introduce confusion into the law. *Robertson and Kirkham, supra,* pp. 722-723 and footnote 4, citing *Mass & Waldstein Co.* v. *U. S.* 283 U. S. 583. A fortiori, the writ should be granted where, regardless of the Government's belief, the decision is, as here, in fact wrong because in conflict with the principles of this Court's decisions and in fact likely to introduce confusion in the law.

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* With regard to decisions of a Court of Appeals, it is there stated (p. 114) that where such a decision "clearly fails to apply prior Supreme Court decisions because of error or oversight, the Court usually grants certiorari."

Conclusion.

Because of all these errors committed by the lower Court and for these additional reasons, as well as for those presented in the Petition, it is submitted that, in order to prevent a gross miscarriage of justice, the Petition for a Writ of Certiorari should be granted.

Dated June 9, 1959.

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